RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 24 2016
OFFICE OF THE CLERK

No. 15-1204

IN THE
Supreme Court of the United States

DAVID JENNINGS, ET AL.,
Petitioners,

v.

ALEJANDRO RODRIGUEZ, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND THE IMMIGRANT LEGAL RESOURCE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

SEJAL ZOTA
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
14 Beacon Street
Suite 602
Boston, Massachusetts 02108
(617) 227-9727

DAVID C. FREDERICK
Counsel of Record
JOSHUA D. BRANSON
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

October 24, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY 2

ARGUMENT 5

I. THE COURT CAN AVOID MOST OF THE CONSTITUTIONAL PROBLEM POSED BY PROLONGED MANDATORY DETENTION UNDER § 1226(c) BY LIMITING IT TO DETAINEES WHO LACK A SUBSTANTIAL ARGUMENT AGAINST THE ENTRY OF A REMOVAL ORDER 5

A. Section 1226(c) Can Be Read To Authorize Mandatory Detention Only When The Detainee Lacks A Substantial Defense To The Entry Of A Removal Order 5

B. Limiting § 1226(c) To Immigrants Who Lack A Substantial Challenge To Removability Would Address Most Of The Constitutional Concerns Respondents Identify 13

II. THE CURRENT PROCESS FOR CHALLENGING MANDATORY DETENTIONS FAILS TO ADDRESS THE CONSTITUTIONAL PROBLEM 16

A. The *Joseph* Process Is Inadequate 17

B. The Court Should Use Criminal Bail Standards To Fill The Statutory Gap 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Demore v. Kim, 538 U.S. 510 (2003) 2, 4, 6, 7, 8, 11, 12, 13, 14, 16, 19, 20, 21

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 10

Fisher v. United States, 562 U.S. 831 (2010) 20

Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015) 12, 13

Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91 (2011) 19

Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) 19

Olivas-Motta v. Holder, 746 F.3d 907 (9th Cir. 2013)..... 19

Ramirez-Garcia v. Holder, 550 F. App'x 501 (9th Cir. 2013)..... 18

Randell v. United States, 474 U.S. 1008 (1985)..... 21

Sopo v. U.S. Att'y Gen., 825 F.3d 1199 (11th Cir. 2016) 14

Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005) 18, 19

United States v. Castiello, 878 F.2d 554 (1st Cir. 1989) 11

United States v. Gonzalez-Roque, 301 F.3d 39 (2d Cir. 2002) 8

United States v. Powell, 761 F.2d 1227 (8th Cir. 1985)..... 20

United States v. Randell, 761 F.2d 122 (2d Cir. 1985) 20

United States v. Schoffner, 791 F.2d 586 (7th Cir. 1986) 20

Zadvydas v. Davis, 533 U.S. 678 (2001) 4, 5, 6, 10, 11, 17

ADMINISTRATIVE DECISIONS

In re Garcia, 2007 WL 4699861 (BIA Nov. 5, 2007) 18

In re Grajeda, 2010 WL 5559182 (BIA Dec. 15, 2010) 18

In re I-S- & C-S-, 24 I. & N. Dec. 432 (BIA 2008) 8

In re Joseph, 22 I. & N. Dec. 799 (BIA 1999) 4, 6, 16, 17, 18, 19

In re Mascorro-Perales, 12 I. & N. Dec. 228 (BIA 1967) 8

In re Mora-Saucedo, 2010 WL 1607035 (BIA Mar. 29, 2010) 19

In re Ramirez-Garcia, 2007 WL 1153825 (BIA Apr. 5, 2007) 18

STATUTES, REGULATIONS, AND RULES

Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* 15

8 U.S.C. § 1101(a)(47) 9

8 U.S.C. § 1101(a)(47)(A) 9

8 U.S.C. § 1101(a)(47)(B) 9

8 U.S.C. § 1158 15

8 U.S.C. § 1159(c) (§ 209(c)) 14, 15

8 U.S.C. § 1226 10

8 U.S.C. § 1226(c) 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 15, 16, 17, 18, 19, 21

8 U.S.C. § 1226(c)(1)(A) 6

8 U.S.C. § 1226(c)(1)(B) 6

8 U.S.C. § 1226(c)(1)(C) 6

8 U.S.C. § 1226(c)(1)(D) 6

8 U.S.C. § 1226a(a)(2) 9

8 U.S.C. § 1227(a) 10

8 U.S.C. § 1229a(a)(1)-(3) 9

8 U.S.C. § 1229a(c)(1)(A) 6, 9

8 U.S.C. § 1229a(c)(3) 18

8 U.S.C. § 1229a(e)(2) 6

8 U.S.C. § 1229a(e)(2)(A)-(B) 9

8 U.S.C. § 1229b 7, 15

8 U.S.C. § 1229b(a) 10

8 U.S.C. § 1229b(b)(1)(A) 12

8 U.S.C. § 1229b(b)(1)(B) 12

8 U.S.C. § 1229b(b)(1)(C) 12

8 U.S.C. § 1231(b)(3) 15

8 U.S.C. § 1252(a)(1) (1994) 10

8 U.S.C. § 1255 ..... 7, 15

18 U.S.C. § 3143(b) 20

8 C.F.R. § 208.18 15

Sup. Ct. R.:

Rule 37.3(a) 1

Rule 37.6 1

OTHER MATERIALS

Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings*, 26 Geo. Immigr. L.J. 65 (2011) 18

Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* (rev. ed. 2003) 7

INTEREST OF *AMICI CURIAE*[1]

The National Immigration Project of the National Lawyers Guild ("NLG") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For 30 years, the NLG has provided legal training to the bar and the bench on immigration consequences of criminal conduct; it also is the author of *Immigration Law and Crimes* and three other treatises. The NLG has participated as *amicus curiae* in several significant immigration-related cases before this Court. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010). Through its membership network and its litigation, the NLG is acutely aware of the problems faced by immigrants subject to prolonged mandatory detention.

The Immigrant Legal Resource Center ("ILRC") is a non-profit center and national leader in the area of the immigration consequences of criminal convictions. The ILRC has provided information and assistance to thousands of immigration advocates, criminal defenders, courts, and other groups. It has published manuals on the immigration consequences of crimes,

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief; letters reflecting their blanket consent to the filing of *amicus* briefs are on file with the Clerk.

and it has regularly filed *amicus* briefs in this Court in important immigration cases. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010). Through its work, the ILRC has developed a strong interest in the issue of mandatory detention.

INTRODUCTION AND SUMMARY

As respondents have persuasively explained, unreasonably prolonged mandatory detention raises grave constitutional concerns. *Amici* agree that the Court should avoid those concerns by limiting mandatory detention under 8 U.S.C. § 1226(c) to six months (or some other reasonable time period).[2] But the temporal limitation respondents propose is not the only construction of § 1226(c) capable of addressing the constitutional problem created by prolonged mandatory detention. As one Justice has concluded, the Court also can avoid most of the constitutional problem by limiting § 1226(c) to immigrants who lack a substantial challenge to their removability. *See Demore v. Kim*, 538 U.S. 510, 577-79 (2003) (Breyer, J., concurring in part and dissenting in part).

The statute permits such a reading. Section 1226(c) applies only to an immigrant who "is deportable" or "is inadmissible." In light of the broader statutory scheme of which § 1226(c) is a part, those terms are ambiguous in two ways. First, they could refer (as the government maintains) to immigrants whose criminal convictions subject them to a threshold finding of removability – even if they are eligible for relief that would prevent entry of a final removal order. By contrast, the same terms could refer instead to immigrants who lack any substantial

---

[2] Although *amici* agree with respondents on all three questions presented, they write solely to address the second question concerning mandatory detention under § 1226(c).

argument against the entry of a final removal order. There are several textual and structural indicia that Congress used the terms "deportable" and "inadmissible" in § 1226(c) in the latter, narrower sense. And in light of the serious constitutional concerns respondents identify, the canon of constitutional avoidance compels that narrower interpretation.

The second ambiguity concerns the level of certainty required to find that someone is "deportable" or "inadmissible" for purposes of triggering mandatory detention under § 1226(c). The statute itself says nothing about that question. And, as with the first ambiguity, the canon of constitutional avoidance compels a reading of the statute that demands a high degree of certainty about immigrants' removability before subjecting them to mandatory detention.

Construing the statute to apply only to immigrants who lack any substantial defense to the entry of a removal order accords with § 1226(c)'s purpose and with the strong constitutional interests respondents identify. Most cases of prolonged detention arise because the detainee raises strong challenges to removability that require time to adjudicate. For that reason, exempting such individuals from § 1226(c)'s mandate would provide a significant check on prolonged detentions. It also would comport with § 1226(c)'s purpose: to prevent immigrants who present a heightened risk of flight or danger from reoffending or fleeing pending their removal. As the record below shows, immigrants with strong arguments against removal have strong incentives to show up to their removal hearings to litigate those defenses. Such immigrants – who tend to have less serious criminal histories and have other strong

equities in their favor – are not the type of people Congress had in mind when enacting § 1226(c).

Finally, the current process by which immigrants may challenge mandatory detention does not ameliorate the constitutional concerns created by prolonged detention. That process, which provides detainees with so-called "*Joseph* hearings,"[3] does virtually nothing to protect immigrants from erroneous mandatory detentions. With respect to the first ambiguity noted above, *Joseph* does not even permit detainees to challenge mandatory detentions on the basis that they are eligible for relief from removal. And, with respect to the second, *Joseph* places a burden of proof on immigrants so onerous that it is all but impossible for the government to lose. That burden of proof cannot be squared with immigrants' strong liberty interests in remaining free from prolonged detention. Indeed, the BIA decided *Joseph* prior to this Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and it paid no attention to the grave constitutional interests implicated by mandatory civil detention.

Rather than rely on the unconstitutional *Joseph* process, the Court should look instead to criminal bail standards to fill the statutory gap left open by § 1226(c). *See Demore*, 538 U.S. at 578 (Breyer, J.). Those standards would provide courts with a ready set of workable criteria for determining when an immigrant possesses a substantial challenge to removability. When an immigrant raises such a challenge, § 1226(c) should not apply.

---

[3] *See In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999).

ARGUMENT

I. THE COURT CAN AVOID MOST OF THE CONSTITUTIONAL PROBLEM POSED BY PROLONGED MANDATORY DETENTION UNDER § 1226(c) BY LIMITING IT TO DETAINEES WHO LACK A SUBSTANTIAL ARGUMENT AGAINST THE ENTRY OF A REMOVAL ORDER

As respondents have ably shown, prolonged mandatory detention raises serious constitutional concerns. *Amici* agree that the Court should construe the statute to avoid those concerns by restricting mandatory detention to six months (or, at the very least, a reasonable time period). The Court should affirm on that basis alone. *See* Resp. Br. 34-41.

But as respondents also point out (at 21 & n.6), the Court alternatively can limit § 1226(c) to immigrants who lack a substantial argument against their removability. That reading would mostly avoid the constitutional concerns that respondents identify. *Amici* write separately to elaborate on this alternate ground for affirmance.

A. Section 1226(c) Can Be Read To Authorize Mandatory Detention Only When The Detainee Lacks A Substantial Defense To The Entry Of A Removal Order

The grave constitutional concerns respondents identify require this Court to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Although respondents offer one such construction of § 1226(c), *see* Resp. Br. 34-36, there is an alternative that likewise would "avoid[]" most of the constitutional concerns raised by that provision. *Zadvydas*,

533 U.S. at 689. Specifically, § 1226(c) imposes mandatory detention if an immigrant "*is deportable* by reason of having committed" a predicate criminal offense. 8 U.S.C. § 1226(c)(1)(B), (C) (emphasis added).[4] That language raises the threshold question of when an immigrant "is deportable" for purposes of mandatory detention.

The government appears to answer that question (at 32-33) by assuming that § 1226(c) applies to all immigrants whom it charges (or could charge) as "hav[ing] committed the specified offenses" designated in § 1226(c). Under that view, once the government asserts that an immigrant has been convicted of a predicate offense, § 1226(c) applies unless the government is "substantially unlikely" to establish that the immigrant's conviction was actually for an offense that falls within a predicate category of removal listed in the statute. *In re Joseph*, 22 I. & N. Dec. 799, 800 (BIA 1999).

The statute, however, permits a different reading. As one Justice has concluded, § 1226(c) also can be read to allow an immigrant to seek release on bond so long as the immigrant has a claim that "he is not deportable" that "(1) [is] not interposed solely for purposes of delay and (2) raises a question of 'law or fact' that is not insubstantial." *Demore v. Kim*, 538

---

[4] Section 1226(c) also applies to immigrants who are "*inadmissible* by reason of having committed" certain predicate offenses. 8 U.S.C. § 1226(c)(1)(A), (D) (emphasis added). The statutory arguments set forth herein apply equally to immigrants detained under this "inadmissibility" prong. *See id.* § 1229a(c)(1)(A) (providing that "[a]t the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States"); *id.* § 1229a(e)(2) (defining the term "removable" as referring to immigrants who are "inadmissible" or "deportable"). For brevity's sake, however, *amici* focus on the "is deportable" prong of § 1226(c).

U.S. 510, 578-79 (2003) (Breyer, J., concurring in part and dissenting in part). The Court now should adopt that interpretation and limit § 1226(c) to immigrants who lack a substantial argument against the entry of a removal order.

1.a. The statutory text does not require the detention of immigrants who have substantial arguments against their removability. By using the phrase "is deportable," Congress evinced an intent to cover only those immigrants against whom the entry of a removal order is fairly certain – not those who merely "may, or may not," be ordered removed. *Demore*, 538 U.S. at 578 (Breyer, J.). Indeed, § 1226(c) itself "literally say[s] nothing about an individual who, armed with a strong argument against deportability, might, or might not," be deportable. *Id.*

Such an argument against deportability can take two forms. First, detainees may have a substantial argument at the threshold that they are not properly subject to mandatory detention because their convictions are not for one of the offenses that § 1226(c) enumerates (or because they are U.S. citizens). Second, some individuals who are removable in the threshold sense may still have bases for contesting their removability as a final matter, by pursuing relief such as cancellation of removal or adjustment of status. *See* 8 U.S.C. §§ 1229b, 1255. If immigrants successfully obtain such relief, they are not removable on the basis of the charged convictions and maintain (or obtain) lawful permanent status in the United States. *See, e.g.*, Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 64.04[8], at 64-44.57 (rev. ed. 2003) ("A grant of cancellation extinguishes existing grounds for removal, and they cannot be invoked

subsequently to remove the applicant.").[5] In both cases – the immigrant whose conviction was not for a qualifying offense, and the one who attains relief such as cancellation – no removal order ever issues.

Demore had no occasion to consider whether such individuals are subject to mandatory detention because the Court found that Mr. Kim did not dispute that he was "'deportable' within the meaning of § 1226(c)." *Demore*, 538 U.S. at 522.[6] This case now offers the Court an opportunity to reach that question and construe the phrase "is deportable" in a manner consistent with the "strong" "constitutional claims to bail" respondents identify. *Id.* at 577 (Breyer, J.).

---

[5] *See also United States v. Gonzalez-Roque*, 301 F.3d 39, 42 n.1 (2d Cir. 2002) ("The adjustment of status procedure allows a qualifying deportable alien to change his status to that of an alien who had not committed the offense which otherwise rendered him deportable."); *In re Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967) ("[W]hen relief has been granted . . . , it would be clearly repugnant to say that the respondent remains deportable because of the same conviction.").

[6] To be sure, Mr. Kim applied for withholding of removal and therefore did not concede that he ultimately should be removed. *Demore*, 538 U.S. at 522 n.6. But a grant of withholding does not prevent the entry of a removal order and provides no permanent right to remain in the United States. *See In re I-S- & C-S-*, 24 I. & N. Dec. 432, 434 n.3 (BIA 2008). Instead, withholding simply prohibits removal to a particular specified country for as long as conditions exist in that country threatening the immigrant with severe hardship or torture. It does not prevent removal to a third country or removal to the specified country, should conditions change. Accordingly, immigrants applying solely for withholding (which is how this Court viewed Mr. Kim) are not challenging the entry of a removal order and so are "deportable" as *Demore* appeared to have understood that term. While such immigrants no doubt retain some incentive to appear for removal proceedings, those incentives are categorically weaker than the incentives of people who have the opportunity to maintain or obtain permanent immigration status.

b. The term "is deportable," though ambiguous, may be read to encompass only individuals who lack a substantial defense to the entry of a removal order. Section 1101(a)(47) provides that an immigrant does not become "deportable" until after an immigration judge ("IJ") has entered an "order of deportation . . . concluding that the alien is deportable." 8 U.S.C. § 1101(a)(47)(A).[7] In fact, unless otherwise specified, removal proceedings – in which an IJ must "decid[e] the . . . deportability of an alien" – supply the "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States." *Id.* § 1229a(a)(1)-(3). "At the conclusion" of a removal proceeding, the IJ "decide[s] whether an alien is removable," *id.* § 1229a(c)(1)(A) – that is, the IJ issues an order determining whether the immigrant is "deportable" or "inadmissible," *id.* § 1229a(e)(2)(A)-(B).

The term "is deportable" in § 1226(c) most naturally refers to immigrants who lack any substantial defense to the entry of such an order. Indeed, the contrast between § 1226(c) and § 1226a(a)(2) suggests that Congress did not intend the former to cover immigrants who possess such a defense. Section 1226a(a)(2) mandates detention for certain immigrants determined to pose national-security risks "irrespective of any relief from removal for which the alien may be eligible." Section 1226(c), by contrast, contains no such qualifier and instead applies only to immigrants who "[are] deportable." Congress's decision to omit from § 1226(c) the phrase "irrespective

---

[7] A removal order becomes "final" and authorizes the immigrant's actual removal only after the BIA affirms the IJ's order, or after the time for taking an appeal to the BIA expires. 8 U.S.C. § 1101(a)(47)(B).

of any relief from removal" is strong evidence that it considered arguments for such relief relevant to the scope of that provision. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings . . . [,] particularly . . . where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.").

The statutory history further suggests that the term "is deportable" is ambiguous. The predecessor statute to § 1226 authorized the Attorney General to detain an immigrant "[p]ending a determination of deportability." 8 U.S.C. § 1252(a)(1) (1994). That context makes clear that Congress was using "deportability" in the sense of referring to an IJ's *final* order finding an immigrant removable. *See also id.* (referring to "such final determination of deportability"). Such a meaning, which is incompatible with the government's view that the word "deportable" can refer only to an immigrant's threshold removability, reinforces that the government's view is not the only interpretation of § 1226(c) that is "fairly possible." *Zadvydas*, 533 U.S. at 689.

To be sure, other parts of the statutory scheme show that Congress also uses the term "is deportable" in the threshold sense of describing immigrants who are merely subject to removal proceedings on the basis of conduct that renders them potentially removable on a ground designated under the statute. *See, e.g.*, 8 U.S.C. § 1227(a) (describing "classes of deportable aliens"); *id.* § 1229b(a) (authorizing the Attorney General to "cancel removal in the case of an alien who is . . . deportable"). The government

undoubtedly will argue that Congress intended the same meaning in § 1226(c). But those other provisions merely demonstrate that the term "is deportable" is ambiguous. In the face of such ambiguity, the Court should read the statute to avoid the constitutional doubts raised by the government's position. *See Zadvydas*, 533 U.S. at 689; *see also* Resp. Br. 33.

2. *Amici*'s construction of § 1226(c) also accords with the statute's purpose of "preventing deportable criminal aliens from fleeing." *Demore*, 538 U.S. at 528. Section 1226(c) reflects Congress's judgment that mandatory detention of covered immigrants provides "the best way to ensure their *successful removal* from this country." *Id.* at 521 (emphasis added). That goal is inapplicable to individuals who raise substantial challenges to their removability. Immigrants who raise such challenges are neither "already subject to deportation," *id.* at 518, nor motivated to "reoffend and flee" prior to their removal hearings, Pet. Br. 32. On the contrary: immigrants with strong defenses to removal have strong incentives to appear at their proceedings and litigate those defenses. *See Zadvydas*, 533 U.S. at 690 (calling the "justification" of "preventing flight" "weak or nonexistent where removal seems a remote possibility at best"); *cf. United States v. Castiello*, 878 F.2d 554, 555 (1st Cir. 1989) (per curiam) ("[A]s a matter of common sense, the likelihood of succeeding on appeal is relevant to flight risk.").

Nor is the mandatory detention of individuals with substantial challenges to their removability reasonably related to Congress's goal of "protecting the public from dangerous criminal aliens." *Demore*, 538 U.S. at 515. Individuals whose offenses do not actually constitute grounds for mandatory removal

have not been "convicted of one of a specified set of crimes" that Congress associated with a heightened risk of danger. *Id.* at 513. On the contrary, by enacting statutory forms of relief such as cancellation and adjustment, Congress allowed qualified individuals convicted of less-serious offenses the opportunity to reside permanently in the United States.[8] If Congress had viewed those individuals as presenting such a heightened danger to the public as to require their mandatory detention, it would not have made them eligible for permanent relief from removal.

The experience of the named plaintiff in *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) – in which the Second Circuit joined the Ninth Circuit in limiting mandatory detention to six months – illustrates the point. Mr. Lora is a lawful permanent resident ("LPR") who lived continuously in the United States for 19 years alongside his father (also an LPR) and his mother, siblings, and fiancée (all U.S. citizens). *Id.* at 606. Based on a minor state-law conviction for third-degree cocaine possession, the government initiated removal proceedings against him. *Id.* at 606-07. Mr. Lora's controlled-substances conviction exposed him to removal proceedings, but they did not foreclose him from obtaining cancellation of removal and retaining his right to remain here permanently.

---

[8] For example, eligibility for cancellation of removal is predicated on factors such as the absence of an aggravated-felony conviction and the length of ties to the community – both of which are factors that correspondingly decrease the risk of flight and danger. *See* 8 U.S.C. § 1229b(b)(1)(A), (C). Similarly, cancellation for immigrants who are not lawful permanent residents requires a showing of "good moral character," *id.* § 1229b(b)(1)(B), making it unlikely that an immigrant who qualifies for such relief could present a heightened danger to the public.

See id. at 607 (noting that "Lora now has a strong argument for cancellation of removal"). Nonetheless, because of the government's view of § 1226(c), it considered him "deportable" from the outset and subjected him to many months of mandatory detention – which ended only when a district court awarded him habeas relief. *Id.* at 607-08.

Mr. Lora is not the type of individual to whom Congress intended § 1226(c) to apply. His deep ties to this country, along with the relatively minor nature of his controlled-substances conviction, give him a substantial argument against deportability. And he has every incentive to remain peacefully integrated into society and to show up to his removal hearings to litigate his claims for relief. Indeed, the "government did not seriously dispute that Lora was neither a flight risk nor a danger to the community," and since his release on bond he has "remain[ed] gainfully employed, tied to his community and poised to contest his removability." *Id.* at 608. The government cannot credibly claim that denying individuals like Mr. Lora the opportunity to seek bond serves any legitimate immigration purpose.

B. Limiting § 1226(c) To Immigrants Who Lack A Substantial Challenge To Removability Would Address Most Of The Constitutional Concerns Respondents Identify

Amici's interpretation of the statute addresses most of the constitutional problem presented by prolonged mandatory detention. *See Demore*, 538 U.S. at 578-79 (Breyer, J.) (explaining that this interpretation "is consistent with what the Constitution demands"). *Amici*'s construction addresses the core reason that many detentions become unreasonably prolonged. Prolonged mandatory detentions do not

occur in the abstract; they typically happen to immigrants whose removal cases take a long time to litigate. And those cases generally involve substantial arguments against removal. Resp. Br. 23-25. For immigrants who lack any bona fide argument against removal, the government should be able to complete removal proceedings quickly and thereby limit any mandatory detention to the "brief period" that *Demore* upheld. 538 U.S. at 513. But when immigrants press substantial challenges to removal, their cases take longer to litigate and their detentions tend to grow unreasonably prolonged. Resp. Br. 9.

The example of Maxi Sopo, whom undersigned counsel represented before the Eleventh Circuit, offers one case in point. *See Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199 (11th Cir. 2016). Mr. Sopo suffered through more than four years of mandatory detention before the Eleventh Circuit ordered the government to provide him a bond hearing. *Id.* at 1220-21. The "bulk" of the delay responsible for his lengthy detention "came from the IJ erring several times" in denying adjustment of status under 8 U.S.C. § 1159(c). *Id.* at 1221. Indeed, Mr. Sopo's removal case is now before the IJ "for a fourth round of review" after *three reversals* (two by the BIA, one by the Eleventh Circuit after the government confessed error) of the IJ's erroneous decisions. *Id.* at 1203. That experience illustrates how many prolonged detentions happen. Because Mr. Sopo's strong arguments against removal precipitated multiple rounds of successful appeals, his removal proceeding – and thus his mandatory detention – surpassed four years.

Mr. Sopo's experience is admittedly extreme, but it illustrates a larger point: that people who challenge their removability in the ordinary course often end

up detained for significant periods of time. *See* Resp. Br. 19-20. The record in this case confirms as much. Roughly 70% of the § 1226(c) subclass filed for relief from the entry of a removal order,[9] and, of those 70%, nearly 40% won relief from a removal order. JA95, tbl. 23. In addition, approximately 4% of Mandatory Subclass members won termination of their removal proceedings because the government failed to meet its burden to establish their threshold removability. JA96 & tbls. 25-26.[10] Ultimately, Mandatory Subclass members were roughly five times more likely to win their removal cases than a typical detainee. *See* JA96 & tbls. 25-26; JA122 & tbl. 35.

Those statistics reveal a strong correlation between the prolonged detention and the presence of substantial arguments against removability. *See also* JA80-81 & tbls. 11-12 (finding that applying for relief extends time in detention). Indeed, the 70% figure quoted above likely understates the number of Mandatory Subclass members with substantial arguments against removability, as it does not account for those who advanced substantial challenges to their threshold removability (either because they were not convicted

---

[9] Common forms of relief that defeat removability are asylum, 8 U.S.C. § 1158; cancellation, *id.* § 1229b; adjustment of status, *id.* § 1255; and waiver under § 209(c) of the Immigration and Nationality Act, *id.* § 1159(c). Applications for withholding of removal, *see id.* § 1231(b)(3), and protection under the Convention Against Torture, *see* 8 C.F.R. § 208.18, by contrast, are excluded because those forms of relief do not prevent the entry of a final removal order. *See supra* note 7.

[10] The 4% figure encompasses only the subclass members who successfully challenged their threshold removability; the record does not reveal how many additional subclass members raised substantial (though ultimately unsuccessful) challenges of a similar nature.

of a predicate offense or because they were U.S. citizens). Accordingly, while *amici*'s interpretation does not address the entire problem posed by prolonged detention, it would go a long way toward providing relief to the Mandatory Subclass and avoiding the constitutional question posed by the government's interpretation of § 1226(c).

II. THE CURRENT PROCESS FOR CHALLENGING MANDATORY DETENTIONS FAILS TO ADDRESS THE CONSTITUTIONAL PROBLEM

Under the current system, mandatory detainees receive only a limited opportunity to challenge their detentions: they may request a so-called "*Joseph* hearing" at which they may "raise any nonfrivolous argument available to demonstrate that [they are] not properly included in a mandatory detention category." *Demore*, 538 U.S. at 514 (citing *Joseph*, 22 I. & N. Dec. 799). This Court, though noting the availability of *Joseph* hearings, has not passed on their adequacy. *Id.* at 514 n.3.

Joseph hearings are insufficient to avoid the constitutional problem that respondents and *amici* have identified. Rather than rely on *Joseph* hearings, the Court should hold that detainees are entitled to a bond hearing so long as they present a claim that they are "not deportable" that "(1) [is] not interposed solely for purposes of delay and (2) raises a question of 'law or fact' that is not insubstantial." *Id.* at 578-79 (Breyer, J.). In evaluating whether an immigrant has satisfied that requirement, courts may draw on well-settled criminal "bail standards" "to fill th[e] statutory gap." *Id.* at 578.

A. The *Joseph* Process Is Inadequate

As respondents have explained (at 21 n.6), *Joseph* hearings do not remedy the constitutional problem posed by prolonged mandatory detention. To begin with, *Joseph* severely restricts the type of arguments detainees can make: it allows them only to challenge whether the charged conviction is for a qualifying offense enumerated in § 1226(c). *See Joseph*, 22 I. & N. Dec. at 801. As such, detainees are precluded from challenging their detention based on claims for "relief from removal." JA209. For the reasons set forth above, the Court should construe § 1226(c) to exclude from mandatory detention those immigrants with substantial claims for such relief. *See supra* Part I.A. The inability to make those arguments under the current system renders *Joseph* inadequate.

Further, *Joseph* hearings are inadequate even with respect to the arguments that they allow immigrants to make. *Joseph* places the burden on the detainee to show that the government is "substantially unlikely" to establish that the immigrant committed a criminal offense properly included within a category listed in § 1226(c). 22 I. & N. Dec. at 800. In light of the strong constitutional liberty interests at stake, *see Zadvydas*, 533 U.S. at 692, that standard is far too deferential to the government. Indeed, *Joseph* was issued before *Zadvydas*, and the majority opinion does not even consider detainees' constitutional due-process rights. *See* 22 I. & N. Dec. at 800-09. The only mention of due process appears in the partial dissent, which found that the majority gave unduly short shrift to detainees' "constitutionally-protected liberty interests." *Id.* at 809-10 (Schmidt, J., concurring in part and dissenting in part). In doing so, the majority created a standard so demanding that it

is "not just unconstitutional," but "egregiously so." *Tijani v. Willis*, 430 F.3d 1241, 1246 (9th Cir. 2005) (Tashima, J., concurring).

The practical result of the *Joseph* standard is to make it virtually impossible for erroneously detained immigrants to contest their mandatory detentions.[11] For example, the *Joseph* standard is so stringent that it permits mandatory detention based on an inconclusive record of conviction that would be undisputedly inadequate in a removal proceeding. *Compare In re Grajeda*, 2010 WL 5559182, at *2 (BIA Dec. 15, 2010) (allowing detention based on "inconclusive" "conviction documents"), *with* 8 U.S.C. § 1229a(c)(3) (requiring government to show deportability by "clear and convincing evidence"). It also permits the mandatory detention of U.S. citizens. *Compare In re Ramirez-Garcia*, 2007 WL 1153825, at *2 (BIA Apr. 5, 2007) (permitting detention because evidence of citizenship was "inconclusive"), *with Ramirez-Garcia v. Holder*, 550 F. App'x 501 (9th Cir. 2013) (later granting unopposed petition for review because same detainee was actually a U.S. citizen).

By the same token, *Joseph* places an onerous burden on detainees who raise bona fide *legal* arguments against their inclusion in § 1226(c).[12] That enables absurd results, such as when the BIA sustained a

---

[11] *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings*, 26 Geo. Immigr. L.J. 65, 87-88 (2011).

[12] *See, e.g., In re Garcia*, 2007 WL 4699861, at *1 (BIA Nov. 5, 2007) ("[a] legal argument that deportability will not be established is insufficient to meet the respondent's burden of proof in this matter in the absence of precedent caselaw directly on point").

mandatory detention based on asserted doubts about whether the Ninth Circuit "would follow its own prior caselaw" making clear that the detainee's conviction was not for a qualifying offense. *In re Mora-Saucedo*, 2010 WL 1607035, at *3 (BIA Mar. 29, 2010); *see Olivas-Motta v. Holder*, 746 F.3d 907, 908 (9th Cir. 2013) (subsequently abrogating the agency decision on which the BIA had relied). It also conflicts with the well-settled principle that "evidentiary standard[s] of proof appl[y] to questions of fact and not to questions of law." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring); *see Moncrieffe v. Holder*, 133 S. Ct. 1678, 1688-89 (2013). When a detainee's challenge rests on a pure question of law, the government is either right or wrong about that question – and mandatory detention should be disallowed if the government is wrong. But, under *Joseph*, an immigrant can escape mandatory detention only if the government's legal position is frivolous. That standard is "all but insurmountable" for detainees and offers them no meaningful protection. *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring).

B. The Court Should Use Criminal Bail Standards To Fill The Statutory Gap

The Court should look to "bail standards drawn from the criminal justice system," instead of the unconstitutional *Joseph* standard, "to fill th[e] statutory gap" created by § 1226(c). *Demore*, 538 U.S. at 578 (Breyer, J.). Rather than place an impossibly onerous burden on detainees, criminal bail standards (applicable to convicted defendants who challenge their convictions on appeal)[13] would permit detainees to

[13] In one sense, immigrants detained under § 1226(c) arguably merit a standard more lenient than do convicted criminal

seek their release when they raise challenges to their removability that are "not insubstantial." *Id.* at 579. Those standards are "more protective of a detained alien's liberty interest than those currently administered in . . . *Joseph* hearings." *Id.* at 578. And they also have "proved workable in practice in the criminal justice system." *Id.* (citing 18 U.S.C. § 3143(b)). Indeed, the circuits already have long experience interpreting the criminal bail statute in a way that is "reasonably easy to apply." *United States v. Powell*, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc); *see United States v. Schoffner*, 791 F.2d 586, 589 (7th Cir. 1986) (per curiam) (similar). Courts could draw on that experience in applying the test that *amici* propose here.

The interpretive questions posed by the criminal bail statute do not appear to have created any significant problem in the 30 years since the statute was enacted. The circuits' various interpretations of that statute do not "differ significantly from each other," *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985), and *amici* are not aware of a single case in which this Court felt the need to grant certiorari on a question concerning when a defendant's appellate arguments are sufficiently "substantial" to warrant bail under 18 U.S.C. § 3143(b). *See, e.g., Fisher v. United States*, 562 U.S. 831 (2010) (denying certiorari in case concerning interpretation of § 3143(b));

---

defendants seeking bail under 18 U.S.C. § 3143(b). After all, defendants applying for bail under the latter statute have by definition already lost at trial and been sentenced to the term of imprisonment from which they are seeking release on bail. But, despite that distinction, *amici* agree that the criminal bail statute would provide a "workable" test for policing mandatory detention in a way that comports "with what the Constitution demands." *Demore*, 538 U.S. at 578-79 (Breyer, J.).

Randell v. United States, 474 U.S. 1008 (1985) (same). Applying the same bail standards to mandatory immigration detention would provide a similarly administrable way of determining when "§ 1226(c) deportability is in doubt" such that mandatory detention is no longer justified. *Demore*, 538 U.S. at 578 (Breyer, J.).

CONCLUSION

The judgment of the court of appeals should be affirmed for the reasons respondents explain. Alternatively, the Court should hold that § 1226(c) permits mandatory detention only when the detainee lacks a substantial challenge to removability.

Respectfully submitted,

SEJAL ZOTA
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
14 Beacon Street
Suite 602
Boston, Massachusetts 02108
(617) 227-9727

DAVID C. FREDERICK
Counsel of Record
JOSHUA D. BRANSON
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

October 24, 2016